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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK SOLANO MENDOZA,

Defendant and Appellant.

F034754

(Super. Ct. No. 78061)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. James M. Stuart and Michael B. Lewis, Judges.*

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, Louis M. Vasquez and Christine Levin, Deputy Attorneys General, for Plaintiff and Respondent.

On November 4, 1999, defendant Frank Solano Mendoza was convicted of possessing phencyclidine (PCP), driving under the influence of alcohol, and being under the influence of a controlled substance. The trial court found he had served nine prior prison terms and had suffered two prior strikes -- for rape and attempted first

* Judge Lewis denied defendant's motion to suppress. Judge Stuart denied defendant's motion for mistrial and sentenced him.

degree burglary. Defendant appeals, claiming the trial court erred by denying (1) his motion to suppress evidence, (2) his motion for mistrial based on juror misconduct, (3) his request to dismiss either or both of his prior strikes, and (4) his request to strike prior prison term enhancements. He also contends his sentence of 33 years to life constitutes cruel or unusual punishment.

FACTS

Suppression Hearing

On September 22, 1999, the court heard defendant's motion to suppress evidence. The following facts are taken from testimony presented at that hearing.

On July 31, 1999, at about 10:00 p.m., Officer Dennis Moore was on patrol in Bakersfield. He received a call from a police dispatcher alerting him to a possible drunk driver. A concerned citizen driving a black Mitsubishi Montero was following the possible drunk driver, who was reportedly operating a black Chevrolet pickup truck. Moore drove to the specified location and observed both vehicles. He pulled behind the pickup, which was stopped at the curb. He used his spotlight to illuminate the interior and saw defendant sitting in the driver's seat. As Moore walked toward the pickup, it pulled away from the curb and drove at a slow speed with a pronounced weave. The vehicle veered to the left of the center of the road. In Moore's experience, this driving pattern -- driving with a pronounced weave and at a slow speed -- was consistent with driving under the influence.

The pickup was traveling at about 15 to 20 miles per hour in an area where the normal speed was approximately 25 to 35 miles per hour. After observing the vehicle for about 5 to 10 seconds, Officer Moore turned on his overhead emergency lights, but instead of pulling over defendant continued driving about a block before stopping. During the entire time Moore observed defendant driving, the pickup did not follow a straight path; it weaved the entire time.

At the time he activated the emergency lights of his vehicle, Officer Moore had formed the opinion defendant was driving under the influence. Moore had been a police officer for seven years, had made over 100 drunk driving arrests, and had received specialized training for recognizing driving under the influence. He had training and extensive experience in dealing with persons under the influence of alcohol and controlled substances.

Sentencing Report

According to the sentencing report prepared by the probation office, the 46-year-old defendant has two prior strikes -- a conviction for a rape occurring in August 1975 and a conviction for a second degree attempted robbery occurring in September 1990. He has three prior convictions for burglary, two for being under the influence, one for driving under the influence, one for grand theft, five for forgery, two for writing a bad check with intent to defraud, one for receiving stolen property, one for spousal abuse, and one for failing to properly register as a sex offender. He has been sentenced to prison nine times for periods ranging from two to four years.

DISCUSSION

I.

Motion to Suppress Evidence

Defendant contends the trial court erred when it denied his motion to suppress evidence, including observations of Officer Moore and assisting officers, photographs, statements made by defendant, and a hand-rolled cigarette containing PCP. (Pen. Code, § 1538.5.) At the suppression hearing, held on September 22, 1999, defendant argued Moore's testimony regarding his erratic driving was not credible, the detention was not justified, the anonymous tip was not sufficiently corroborated, and the tape of the dispatcher's call relaying the tip was inadmissible as hearsay. The prosecution argued defendant's erratic driving alone provided reasonable suspicion for the detention, Moore's observations corroborated the anonymous tip, and the dispatch tape

was admissible as a government or business record. The trial court found that, given Moore's training and experience in identifying drivers who operate a motor vehicle under the influence, when Moore activated his emergency lights he had reasonable cause to detain defendant based on observing defendant's initial flight and his erratic driving that followed. The court's finding was not based on the tip from the citizen informant.

On appeal, defendant argues: (1) the officer did not have reasonable suspicion to detain him when he activated his emergency lights; (2) the anonymous tip from the citizen informant did not justify the detention because the tip was too general to be deemed reliable; and (3) the trial court should not have admitted the dispatch tape into evidence because it contained a hearsay statement that defendant was a "drunk driver." Defendant contends admission of the illegally seized evidence constituted reversible error because it prejudiced his Fourth Amendment rights. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

In reviewing the denial of a motion to suppress, we defer to the trial court's findings of fact where they are supported by substantial evidence. But we exercise independent judgment to determine if, on the facts found, the detention was reasonable under the Fourth Amendment. (*People v. Leyba* (1981) 29 Cal.3d 591, 596-597.)

"A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231.)

The reasonable suspicion necessary to justify a brief, investigative detention is a level of suspicion that is "obviously less demanding than that for probable cause" and can be established by "considerably less than proof of wrongdoing by a preponderance of the evidence." (*United States v. Sokolow* (1989) 490 U.S. 1, 7.) Reasonable suspicion is a less demanding standard "not only in the sense that [it] can be

established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.”

(*Alabama v. White* (1990) 496 U.S. 325, 330.)

An officer may properly detain a suspect if the officer observes circumstances consistent with criminal activity. It does not matter if the circumstances are also consistent with innocent activity. Indeed, investigation is warranted to resolve this ambiguity. (*In re Tony C.* (1978) 21 Cal.3d 888, 894; *People v. Green* (1994) 25 Cal.App.4th 1107, 1111.) “[I]f the circumstances are ‘consistent with criminal activity,’ they permit -- *even demand* -- an investigation: the public rightfully expects a police officer to inquire into such circumstances.” (*In re Tony C.*, *supra*, 21 Cal.3d at p. 894, italics added.)

We start by establishing when the detention occurred. It is uncontested the detention did not occur until Officer Moore activated the overhead emergency lights on his patrol car. Contested is whether the circumstances observed by Moore from the time he started observing defendant until the detention constitute a reasonable suspicion defendant was driving under the influence. We conclude Moore had a reasonable suspicion for the stop based on defendant’s pronounced weaving, which took him across the center of the road.

Officer Moore had more than seven years of experience as a police officer, had made more than 100 drunk driving arrests, and had received specialized training for recognizing drunk drivers. He was well qualified to distinguish normal driving from the erratic driving characteristic of those who are intoxicated. He observed defendant to drive slowly and weave during the entire five to ten seconds he drove directly behind defendant prior to initiating the traffic stop. The weaving took defendant’s vehicle, at least momentarily, into the portion of the road reserved for oncoming traffic. These circumstances established an immediate concern for public safety and a

reasonable suspicion the defendant was driving under the influence of alcohol or illegal drugs, justifying Moore's effort to stop defendant's vehicle to investigate further.

Defendant acknowledges that an officer's observation of pronounced weaving, even within a lane, may justify an investigatory stop; however, he insists the observation must cover a substantial distance, such as the three-quarter of a mile distance as was the case in *People v. Perez* (1985) 175 Cal.App.3d Supp. 8, 11. Distance of observation, however, is not a controlling criteria to justify a stop. In *Perez*, the driver's weaving was less pronounced than in this case. The driver in *Perez* was weaving within his own lane, but the defendant in this case actually went beyond the center of the roadway. A trained officer need not follow an erratic driver for three-quarters of a mile, or any other prescribed distance, to form a reasonable suspicion his driving is significantly impaired due to substance consumption. The observation of substantial weaving of a slow driver for as little as five seconds may justify an officer's detaining the driver for further investigation.

Nor does defendant's criticism of the anonymous tip as a basis for the detention aid his argument. The trial court's finding of reasonable suspicion was not based on the anonymous tip furnished by the citizen informant. We agree that by disregarding the anonymous tip and the dispatcher's call relaying that tip, Officer Moore's independent observations from locations where he had a right to be were sufficient, standing alone, to establish reasonable cause for an investigatory stop.

Nevertheless the court indicated that, if required to rule, it would find the tip came from a citizen informant and was sufficiently reliable because it was contemporaneous and because it was corroborated by Officer Moore's observations of the suspect's vehicle, the citizen's vehicle, and the locations and descriptions of both vehicles. Again we agree; certainly the tip proved to be sufficiently reliable to support a finding of reasonable suspicion, when combined with Moore's corroborating

observations, which we have already determined were sufficient standing alone. Even an anonymous tip, when corroborated by independent police work, may exhibit sufficient indicia of reliability to provide reasonable suspicion for an investigatory stop. (*Alabama v. White, supra*, 496 U.S. at pp. 326-327.)

Because we find Officer Moore had reasonable suspicion to detain defendant, independent of the anonymous tip and the dispatcher's call relaying that tip, we need not address whether the tape of the dispatcher's call was properly admitted into evidence by the trial court. Even if we were to find the tape inadmissible, its admission limited to the suppression hearing was harmless in light of the court's express reliance upon Moore's personal observations; substantial evidence supported the court's factual findings and we find the detention was reasonable.

The trial court did not err in denying the motion to suppress evidence.

II.

Motion for Mistrial: Juror Misconduct

The trial court gave the jury general instructions regarding "constructive possession" and "circumstantial evidence." The court also admonished the jury not to independently investigate the law. During deliberations, the jury requested that the court clarify the terms "constructive possession" and "circumstantial evidence." But since it was near the end of the day, the court dismissed the jurors and promised to respond to their question the next morning. But that evening, juror No. 5 decided to research the meaning of "circumstantial evidence" on the internet. He also consulted a dictionary.

The next day, juror No. 5 handed the bailiff a note asking if he could take one page of internet research into the deliberation room. Defense counsel objected to the misconduct and requested a mistrial. The trial court brought the jurors into the courtroom, explained what juror No. 5 had done, and made it clear the conduct was inappropriate. The court interviewed the foreperson, who said that no one had

mentioned or discussed the internet research. The foreperson said juror No. 5 had mentioned he had looked at a dictionary, but the other jurors had told him they did not want to discuss it or hear about it. According to the foreperson, no other juror had said anything about consulting a dictionary or the internet.

The court then directed the jurors, except No. 5, to be recessed to the deliberation room while the court conducted a brief hearing to determine the nature and extent of misconduct. The court questioned juror No. 5, who testified he had reviewed the dictionary definition of “circumstantial” and had downloaded two pages of internet information on “circumstantial evidence.” He had given both pages to the bailiff. The second page contained only one or two irrelevant lines of print. Juror No. 5 testified he had not discussed the case at all with his wife.

The trial court admonished juror No. 5 to disregard the contents of the internet article. The court found the testimony of juror No. 5 credible and denied defense counsel’s motion for a mistrial. The court opined that the definition of “circumstantial evidence” was accurate, but that the highlighted portions might improperly influence jurors.

We accept the trial court’s credibility determinations and findings on questions of historical fact if supported by substantial evidence. Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court’s independent determination. (*People v. Nesler* (1997) 16 Cal.4th 561, 581.) A trial court has the *discretion* to remove a juror who commits *serious and willful* misconduct. (Pen. Code, § 1089; *People v. Daniels* (1991) 52 Cal.3d 815, 866, italics added.)

Where a juror commits misconduct by improperly obtaining information from an extraneous source, we will set aside the verdict “only if there appears a substantial likelihood of juror bias.” (*People v. Nesler, supra*, 16 Cal.4th at p. 578.) “Such bias may appear in either of two ways: (1) if the extraneous material, judged objectively, is

so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not ‘inherently’ prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was ‘actually biased’ against the defendant.” (*Id.* at pp. 578-579.)

Although the actions of juror No. 5 constitute misconduct, the presumption of prejudice has been rebutted in this case. We hold that the information obtained by juror No. 5 was neither inherently prejudicial nor substantially likely to prejudice either juror No. 5 or the other jurors. In contrast, in *People v. Nesler*, the California Supreme Court held that the juror committed prejudicial misconduct by visiting a bar and listening to disparaging allegations that the defendant was a bad mother and a drug user. (*People v. Nesler, supra*, 16 Cal.4th at pp. 574-575.) The juror failed to disclose the information to the trial court and intentionally divulged the information during deliberations in an effort to influence other jurors. (*Id.* at p. 579.) The court ruled the presumption of prejudice arising from this misconduct was not rebutted. (*Id.* at p. 590.)

In the instant case, the nature of the outside information and the extent of the juror’s misconduct did not prejudice defendant; nor did the circumstances demonstrate any juror bias against defendant. Juror No. 5 disclosed the internet information to the court and did not use it to influence other jurors. He disclosed his use of the dictionary to the court and tried to mention the definition in deliberations, but the other jurors prevented him from discussing it. In this case, the information involved definitions of legal terms, matters upon which the court had earlier instructed and then clarified after this incident. The information did not constitute damaging allegations about the defendant’s character. The trial court accepted the assurances of juror No. 5 that he had not discussed the case with others and that he could ignore the outside information.

Neither the trial court's denial of the motion for a mistrial nor its decision to not remove juror No. 5 from the jury constitutes error.

III.

Request to Dismiss Third Strike

Defendant argues the trial court abused its discretion by refusing his request to dismiss at least one of his prior strikes pursuant to Penal Code section 1385. As with most other discretionary rulings, our review of a trial court's decision whether or not to dismiss a prior strike is limited in scope. (*People v. Gillispie* (1997) 60 Cal.App.4th 429, 434; *People v. Benevides* (1998) 64 Cal.App.4th 728, 735.) Appellate courts must give great deference to a trial court's discretionary rulings and will disturb them only upon a clear showing of abuse that has caused a manifest miscarriage of justice. (See *People v. Jordan* (1986) 42 Cal.3d 308, 316.)

“‘[W]here the Legislature establishes a sentencing norm and requires the court explicitly to justify a departure therefrom, and the court sentences in conformity with the legislative standard, *all that is required on the appellate record is a showing that the court was aware of its discretion to select an alternative disposition.*’” (*People v. Gillispie, supra*, 60 Cal.App.4th at p. 434, italics added, citing *People v. Langevin* (1984) 155 Cal.App.3d 520, 524.)

In an argument that mixes advocating discretionary dismissal of a strike and reducing a sentence on grounds of disproportionality, defendant argues in his supplemental brief that *People v. Cluff* (2001) 87 Cal.App.4th 991 supports his position. He contends denial of the motion to dismiss a strike here resulted in a disproportionate sentence of 33 years to life, constituting a cruel and unusual punishment. (The question of cruel and unusual punishment under the United States and California Constitutions will be discussed separately in part IV herein.)

Cluff concerned a trial court's refusal to dismiss any of Cluff's strikes upon his conviction for violation of sex offender registration requirements. After his release

from his prison commitment for sex offenses in 1990, he complied with the law requiring him to register as a sex offender and give notice of changes of residence. In 1995, a new requirement became effective, requiring sex offenders to reregister annually, even if their residence had not changed. Although notified in writing of the new requirement, Cluff did not comply, apparently due to his confusion over whether he needed to reregister unless he had moved to a new address. This failure to register constituted a felony. (*People v. Cluff, supra*, 87 Cal.App.4th at pp. 994-996.) The trial court based its refusal to dismiss any strikes on its finding at the sentencing hearing that, in the commission of the current offense, Cluff acted to “obfuscate” his true residence in an effort to escape the reach of the law; the Court of Appeal vacated the sentence and remanded the matter, finding no substantial evidence supported this finding. (*Id.* at pp. 1001-1002.) In dicta, the *Cluff* court commented, “[N]either the Legislature nor the voters intended the the Three Strikes law to be used as a nuisance statute to rid society forever of persons who fail to meet technical requirements to confirm an accurate registration.” (*Id.* at p. 1004.)

Defendant acknowledges the distinguishable features of *Cluff*, arguing nonetheless that the trial court should have dismissed a strike because, he says, “The Strikes Law was used as a ‘nuisance statute.’” However, the *Cluff* court’s comments about the Three Strikes law are not only dicta, but also arise only in the context of a current offense it viewed as a technical violation of laws. Additionally, *Cluff* dealt with the fairly unique situation of an appellate court’s finding no substantial evidence supported a trial court’s reasoning in refusing to strike any priors. Here, no question arises as to the trial court’s making any findings regarding defendant’s culpability for the instant offense, let alone whether such findings are supported by substantial evidence. Defendant’s current offense was an intentional violation of law. Defendant has a long history of recidivist conduct and has committed prior offenses that are violent and serious. Here, the record establishes the trial court acted to achieve

legitimate sentencing objectives, after a thoughtful and conscientious assessment of all relevant factors. (See *People v. Williams* (1998) 17 Cal.4th 148, 161-164; see also *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530.) The trial court knew it had the discretion, under Penal Code section 1385, to strike defendant's prior convictions. But, the court opted not to exercise its Penal Code section 1385 power and declined to dismiss the prior serious felony convictions. The court chose not to strike the convictions after duly considering defendant's background and individual situation. Defendant has failed to demonstrate the trial court abused its discretion in refusing to dismiss his prior strikes.

IV.

Cruel and Unusual Punishment

Our review of the record indicates defendant did not ask the trial court to find the punishment was cruel and unusual under the federal or state Constitutions. Whether a sentence is cruel and/or unusual is fact specific; the issue must be raised in the trial court. Because defendant failed to raise the issue below, it is waived. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.)

Nonetheless, we offer the following discussion:

A. Federal Constitution.

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Defendant argues his sentence constitutes cruel and unusual punishment because it is disproportionate to the nature of his crimes. He received a sentence of 25 years to life with a consecutive six-year enhancement for possessing PCP and driving under the influence of a controlled substance, and for accumulating three strikes, including prior convictions for rape and attempted robbery.

But defendant's federal claim fails because, as the United States Supreme Court has repeatedly held, the imposition of a lengthy prison sentence on a repeat offender, pursuant to a recidivist statute, does not constitute cruel and unusual punishment. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 996; *Hutto v. Davis* (1982) 454 U.S. 370, 374 & fn. 3; *Rummel v. Estelle* (1980) 445 U.S. 263.) In noncapital cases, the United States Supreme Court has consistently deferred to state Legislatures to determine the appropriate length of prison sentences. (*Id.* at p. 274.) For crimes classified as felonies and "punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is *purely a matter of legislative prerogative.*" (*Ibid.*, italics added.)

In *Rummel*, the United States Supreme Court held it was not "cruel and unusual punishment" to impose a life sentence, under a Texas recidivist statute, on a defendant convicted of his third felony: obtaining \$120.75 by false pretenses. (*Rummel v. Estelle, supra*, 445 U.S. at p. 285.) He had previously been convicted of passing a forged check in the amount of \$28.36, and of fraudulently using a credit card to obtain \$80 worth of goods or services. (*Id.* at p. 265.) In *Hutto*, the United States Supreme Court rejected an Eighth Amendment challenge to a 40-year prison term and a \$20,000 fine for possessing and distributing nine ounces of marijuana. (*Hutto v. Davis, supra*, 454 U.S. 370.) In *Harmelin*, the United States Supreme Court upheld a sentence of life without possibility of parole for possessing 672 grams of cocaine. (*Harmelin v. Michigan, supra*, 501 U.S. at p. 961.)

As the United States Supreme Court has recognized, by imposing severe sentences on repeat offenders, the state promotes a legitimate interest in safeguarding society from crime. "The purpose of a recidivist statute . . . [is] to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time." (*Rummel v. Estelle, supra*, 445 U.S. at

p. 284.) “Thus the interest of the State of Texas here is not simply that of making criminal the unlawful acquisition of another person’s property; it is in addition the interest, *expressed in all recidivist statutes*, in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.” (*Id.* at p. 276, italics added.)

Only in unique cases, involving the death penalty or severe penalties imposed by foreign law, has the United States Supreme Court prohibited the imposition of sentences as “grossly disproportionate to the severity of the crime.” (*Rummel v. Estelle, supra*, 445 U.S. at pp. 271-273; *Weems v. United States* (1910) 217 U.S. 349 [under Philippine law, accountant who mistakenly entered incorrect information, without proof of intent or recklessness, was sentenced to 12 to 20 years in chains at hard labor, plus lifetime surveillance and disqualification from voting].) “Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.” (*Rummel v. Estelle, supra*, 445 U.S. at p. 272.)

It is unclear what test the United States Supreme Court would apply in a noncapital case. On this issue, the court was divided in *Harmelin*. Two justices, Scalia and Rehnquist, would hold that the Eighth Amendment does not prohibit lengthy prison terms because it contains no guarantee that sentences must be *proportionate* to the severity of the crime. (*Harmelin v. Michigan, supra*, 501 U.S. at pp. 985-986.) It only prohibits certain cruel and unusual *methods* of punishment, such as torture and mutilation. (*Id.* at pp. 982-983.) Therefore Justices Scalia and Rehnquist would overrule *Solem v. Helm* (1983) 463 U.S. 277 and would uphold the life sentence without applying any test of proportionality. (*Harmelin v. Michigan, supra*, 501 U.S. at pp. 985-986.) *Solem* held that the Eighth Amendment prohibition against cruel and unusual punishments “prohibits not only barbaric punishments, but

also sentences that are disproportionate to the crime committed.” (*Solem v. Helm*, *supra*, 463 U.S. at p. 284.)

Justices Scalia and Rehnquist would specifically reject the notion that unconstitutional disproportionality can be established by weighing three factors: (1) gravity of the offense compared to severity of the penalty, (2) penalties imposed within the same jurisdiction for similar crimes, and (3) penalties imposed in other jurisdictions for the same offense. (*Harmelin v. Michigan*, *supra*, 501 U.S. at p. 962.) But they conceded the proportionality test may have limited application in only the most extreme cases, for example, “if a legislature made overtime parking a felony punishable by life imprisonment.” (*Ibid.*)

Three justices in *Harmelin* would take a different approach to deciding Eighth Amendment claims alleging cruel and unusual punishment. Justices Kennedy, O’Conner, and Souter would hold that the Eighth Amendment encompasses a narrow proportionality principle that applies to both capital and noncapital cases. (*Harmelin v. Michigan*, *supra*, 501 U.S. at pp. 997-998.) “Though our decisions recognize a proportionality principle, its precise contours are unclear.” (*Id.* at p. 998.) “The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” (*Id.* at p. 1001.)

Under either approach, defendant’s claim fails. Under the approach favored by Justices Scalia and Rehnquist, the Eighth Amendment provides no proportionality guarantee. Under the approach favored by Justices Kennedy, O’Connor, and Souter, defendant’s punishment is not grossly disproportionate when compared with the seriousness of the crimes he has committed and his long history of recidivism. Unlike the crimes committed by the defendant in *Solem*, which were “all relatively minor,” defendant’s crimes are serious because they involve violence and drug use. (*Harmelin v. Michigan*, *supra*, 501 U.S. at pp. 1001-1002.)

Defendant's prior rape conviction involves a crime that is deemed both a "violent felony" and a "serious felony" under the California Three Strikes law. (Pen. Code, §§ 667.5, subd. (c)(3); 1192.7, subd. (c)(3).) His crimes involving drug use and possession also arise in the context of his prior attempted robbery (his other prior strike) and numerous burglaries and other theft offenses; his drug use may reasonably be linked with his demonstrated past violence and extensive commission of property crimes. "Possession, use, and distribution of illegal drugs represent 'one of the greatest problems affecting the health and welfare of our population.'" (*Harmelin v. Michigan, supra*, 501 U.S. at p. 1002.) "Quite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs relate to crime in at least three ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (1) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture." (*Ibid.*)

Moreover, defendant has a long history of failing rehabilitative efforts, having, on numerous occasions, violated the terms of his probation and parole. Defendant is precisely the kind of repeat felon whom the Three Strikes law was designed to deter. As he has continued to commit felonies, the state now has no choice but to incarcerate him for the protection of society.

Defendant's sentence does not violate the federal constitutional ban on cruel and unusual punishment. We are familiar with the recent federal opinion of *Andrade v. California* (9th Cir., Nov. 2, 2001) ___ F.3d ___ [2001 D.A.R. 11769], and are satisfied that it does not affect our analysis on the present facts.

B. State Constitution.

Our state Constitution prohibits "cruel or unusual punishments." (*People v. Weddle* (1992) 1 Cal.App.4th 1190, 1196.) Under the California Constitution, our inquiry is whether the sentence "is so disproportionate to the crime for which it is

inflicted that it shocks the conscience and offends fundamental notions of human dignity.” (*In re Lynch* (1972) 8 Cal.3d 410, 424.) The *Lynch* court identified three factors that may be useful in determining the proportionality of a sentence. First, we examine “the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society.” (*Id.* at p. 425.) Second, we compare the sentence with the penalty for more serious crimes in the same jurisdiction. And third, we compare the sentence to the penalty for the same offense in other jurisdictions. (*Id.* at pp. 425-429.)

In examining the nature of the offender, we consider his “age, prior criminality, personal characteristics, and state of mind.” (*People v. Dillon* (1983) 34 Cal.3d 441, 479.) As to the nature of the offense, we consider the totality of the circumstances surrounding its commission, “including such factors as its motive, the way it was committed, the extent of the defendant’s involvement, and the consequences of his acts.” (*Ibid.*; *People v. Weddle, supra*, 1 Cal.App.4th at p. 1195.)

Defendant has an extensive criminal history involving very serious and violent crimes. As we noted above, drug-related crimes and rape are serious offenses. Similarly, both residential and commercial burglary are serious crimes with the potential for violence. (*People v. Weddle, supra*, 1 Cal.App.4th at p. 1198 & fn. 9.) Defendant has, for some time, presented a considerable danger to others in society. Nothing distinguishes his case from others wherein we have upheld lengthy three strikes sentences against claims of cruel and unusual punishment. (*People v. Cooper* (1996) 43 Cal.App.4th 815, 819-828; *People v. Ingram* (1995) 40 Cal.App.4th 1397, 1412-1417, disapproved on other grounds in *People v. Dotson* (1997) 16 Cal.4th 547, 560, fn. 8.)

Defendant’s sentence is not excessive, considering his long history of recidivist conduct. “Because the Legislature may constitutionally enact statutes imposing more severe punishment for habitual criminals, it is illogical to compare [the defendant’s]

punishment for his `offense,' which includes his recidivist behavior, to the punishment of others who have committed more serious crimes, but have not qualified as repeat felons. Other such offenders would likely receive similar or longer sentences under the new law if the law were applicable to them because of recidivist conduct.” (*People v. Ayon* (1996) 46 Cal.App.4th 385, 400, fn. omitted, disapproved on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 595, 599, fn. 10.)

California’s Three Strikes law is similar to recidivist statutes adopted by many other states. (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1338; *People v. Cooper*, *supra*, 43 Cal.App.4th at pp. 826-828.) That it is among the most extreme does not mean it is unconstitutionally cruel and unusual. (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1516.) “In view of the danger to the safety and peaceful enjoyment of life and property that such [repeat] offenders pose to society, the imposition of a 25-year-to-life sentence for third strikers, like appellant, does not shock the conscience or offend fundamental notions of human dignity.” (*People v. Cooper*, *supra*, 43 Cal.App.4th at p. 828.)

Defendant’s sentence does not violate the state constitutional ban on cruel and unusual punishment.

V.

Prior Prison Term Enhancement

The trial court sentenced the defendant to enhanced punishment based on his prior prison terms. (Pen. Code, § 667.5, subd. (a).) The trial court declined to strike the enhancements, stating it did not have the authority.

“MR. TITUS: Your Honor, perhaps the Court, in view of the positive things the Court has mentioned, with regard to Mr. Mendoza, would consider striking the 667.5(b) allegations.

“THE COURT: I’ve done that a couple of times in the past, and the Appellate Court has always kicked it back to me. [¶] I don’t think I have discretion or, discretion in that regard.”

But Penal Code section 1170.1, former subdivision (h), empowered a trial court to strike the enhanced punishment required by Penal Code section 667.5 “when it determines that there are sufficient circumstances in mitigation and states on the record its reasons for doing so.” (*People v. Jordan* (1986) 42 Cal.3d 308, 318.) Respondent concedes the trial court erred.

Accordingly, we remand this case to allow the trial court to exercise its informed discretion whether to strike any of the defendant’s prior prison term enhancements.

DISPOSITION

We remand this matter to the trial court for the limited purpose of the trial court exercising its discretion in determining whether to strike any of defendant’s prior prison term enhancements. (Pen. Code, § 667.5, subd. (a).) In all other respects, the judgment is affirmed.

VARTABEDIAN, Acting P. J.

WE CONCUR:

WISEMAN, J.

CORNELL, J.